Nos. 12070, 12071

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MYRON E. GLENN, *et al.*,

Plaintiffs-Appellants,

vs.

SOUTHERN CALIFORNIA EDISON COMPANY, LTD.,

Defendant-Appellee.

RAYMOND F. DRAKE, *et al.*,

Plaintiffs-Appellants,

vs.

SOUTHERN CALIFORNIA EDISON COMPANY, LTD.,

Defendant-Appellee.

APPELLANTS' SUPPLEMENTARY BRIEF.

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TABLE OF AUTHORITIES CITED

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APPELLANTS' SUPPLEMENTARY BRIEF.

Short History of Proceedings.

This supplementary brief will cover two appeals taken from cases consolidated for trial below, and by stipulation consolidated on appeal insofar as the rules of this Court permit. Reference to the *Glenn* case is made by the letter "R." Reference to the *Drake* case is made by the word and letter "Drake R."

The first complaint was filed March 19, 1945, setting forth an action by employees against their employer for overtime compensation, liquidated damages and attorneys' fees under the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060; 29 U. S. C. A., §201, *et seq.*).

Following the enactment of the Portal-to-Portal Act of 1947 (Act of May 14, 1947, c. 52, 61 Stat. 84; 29 U. S. C. A., §251, *et seq.*), plaintiffs filed their third amended complaint on September 2, 1947 [R. 103]. Issue was joined by the defendant's answer to this pleading [R. 131]. Trial by jury was demanded [R. 219; Drake R. 76].

The District Court (Hon. William S. Mathes, District Judge) on May 18, 1948, granted defendant's motion for summary judgment and ordered the actions dismissed [R. 329; Drake R. 100].

Judgments of dismissal were signed and filed on June 8, 1948 [R. 331; Drake R. 103]. No findings of fact, conclusions of law or opinion were made or filed, except as the District Court's ground for dismissal may be set forth in its orders [R. 329; Drake R. 100].

Notices of appeal were filed by plaintiffs on June 29, 1948 [R. 334; Drake R. 106]. Defendant does not appeal from the said judgments.

Concise Statement of the Facts.

A detailed statement of the case and the facts will be found beginning at page 6 of Appellants' Brief. There follows under this heading a short undocumented statement of the facts.

These cases concern the right of employees to recover overtime compensation and liquidated damages under the Fair Labor Standards Act of 1938 and the Portal-to-Portal Act of 1947, for work performed by the plaintiffs for the defendant. The work for which compensation is sought was performed prior to May 14, 1947.

Defendant is a public utility engaged in the generation, distribution and sale of electric power in interstate commerce. Plaintiffs, employees of the defendant, fell into four categories of employment:

(a) Substation operators and attendants;

(b) Relief substation operators and attendants;

(c) Hydro employees;

(d) Primary service men.

Except for the primary service men, most of the employees worked and lived in remote, lonely and out-of-the-way places *on the property of the defendant.* They were required by their employer to remain on duty for 24 hours of the work day.

The relief operators and attendants were required to travel from station to station and stay overnight away from their homes and families while performing 24 hour duty at successive stations for one or more days at a time.

The primary service men worked generally on 8 hour shifts, but at the termination of the particular shift they were required to remain at their homes in order to be available to respond to emergency calls. They were paid for "call-outs," but they were not paid for answering or

disposing of matters over the telephone. At Santa Paula, the names of the primary service men were listed as such in the local telephone book and they were required to take complaint calls at their residences from customers. This was the only office available to customers at night. The men were not paid for receiving these calls, but did receive overtime pay if they actually went out to perform "emergency services."

Quite apart from custom and practice, the plaintiffs were employed pursuant to instructions of the defendant, Order No. A-36, which order provided for a 40 hour work week with the following provision as to overtime: "Overtime for employees on a monthly rate of pay shall be paid at one and one-half times the average annual hourly rate. . . ."[1]

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[1]Paragraphs 4, 5 and 8 of defendant's Substation Division Order No. A-36 reads [Pltfs. Ex. 2, pre-trial Drake, R. 172]:

"4. *Classification of Employes*

B. *Field and office employes* are classified and defined as:

(1) *Shift employes,* which includes all classes of plant operators, guards, watchmen, and any other employe that may be temporarily assigned to this classification.

(4) *Week-period employes,* which includes station attendants and any other employe who may be temporarily assigned to this classification.

5. *Hours of Labor*

B. *Field and office employes*

(1) For *shift employes* the regular hours of work shall be any scheduled eight hours in a work-day. Forty hours of work shall constitute a work-week. Days off shall be equivalent to two days per work-week. The work-week is established as starting Monday and continuing through the following Sunday.

(4) *Week-period* employes have no regular scheduled working hours and are subject to call twenty-four hours per day on each day worked. Forty hours of work shall constitute a work-week. Days off shall be equivalent to two days a work-week. The

Appellants' Contentions on Appeal.

Appellants contend:

1. Summary judgment should not have been granted under the Fair Labor Standards or Portal-to-Portal Acts inasmuch as the issues of fact are complex and in dispute.

2. The Portal-to-Portal Act of 1947 does not bar recovery inasmuch as plaintiffs' activities "comprise the regular, normal part of the employment," whereas Section 2 of the Portal-to-Portal Act is "directed against claims for compensation for activities, such as dressing for work, traveling within the plant to the job location, etc."[2]

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work-week is established as starting Monday and continuing through the following Sunday.

8. *Overtime compensation*

C. Overtime for employes on a monthly rate of pay shall be paid at one and one-half times the average annual hourly rate (see paragraph C3 following) except that, if working conditions permit, such overtime may be compensated for by either:

(1) Requiring employes to take equivalent time off within the same work-week, or

(2) Requiring employes to take time off in a subsequent work-week, but within the same pay period (1st to 15th, or 16th to the end of the month) on the basis of one and one-half hours off for each hour of overtime previously worked.

(3) *Average annual hourly rate of pay:* With respect to an employe paid on a monthly salary basis, the monthly salary is subject to translation into its equivalent weekly wage for the purpose of payment of overtime and holiday compensation by multiplying the monthly salary by 12 (the number of months in a year) and dividing the result by 52 (the number of weeks in a year). The hourly rate is then determined by dividing the weekly wage by the normal scheduled working hours in each week."

[2]*Biggs v. Joshua Hendy Corporation,* 183 F. 2d 515, 520 (C. A. 9, 1950, Orr, C. J.).

3. Plaintiffs' services were compensable under express contract.

4. Plaintiffs' services were compensable under custom or practice.

5. The defendant was not relieved of its obligations to plaintiffs by reason of Sections 9 and 11 of the Portal-to-Portal Act.

6. In the face of plaintiffs' contention that they are entitled to recover on an express contract, irrespective of statute, to bar recovery would be to apply the Portal-to-Portal Act unconstitutionally.

Appellee's Contentions.

Appellee disputes the contentions of the appellants in part as follows:

1. Plaintiffs contend that they are entitled to 24 hours of pay for each day that they were on duty for that length of time. Defendant contends that it may divide the duties of plaintiffs into "active" and "inactive," and that it may compress both types of duties and evaluate them at but 8 hours per day.

2. Plaintiffs contend that they are entitled to compensation for "active" and so-called "inactive" services, both under the Fair Labor Standards Act of 1938 and the Portal-to-Portal Act of 1947. They contend that throughout the 24 hour tour of duty, the activities were the same and that there cannot be a distinction made between "active" and "inactive" duty. On the other hand, defendant contends that there were separable inactive services which were not compensable under the Portal-to-Portal Act.

3. Plaintiffs contend that the Portal-to-Portal Act was intended to reach so-called portal-to-portal activities sometimes referred to as preliminary and postliminary activities, and that the statute has "no application where, as here, the work for which compensation is being claimed is the same kind of work as was performed throughout the remainder of the workweek"[3] or workday. On the other hand, defendant contends that the legislature did not so intend and that Section 2 as distinguished from Section 4 of the Portal-to-Portal Act does not apply only to portal-to-portal activities but to all activities.

Supplementary Argument.

This Supplementary Brief is limited to those points of Appellants' Brief as to which there have been subsequent decisions.

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[3]*Biggs v. Joshua Hendy Corporation,* 183 F. 2d 515, 520 (C. A. 9, 1950, Orr, C. J.).

POINT I.

Summary Judgment Should Not Be Granted in Overtime Wage Cases.

Cases under the Fair Labor Standards Act of 1938 and the Portal-to-Portal Act of 1947 are generally concerned with complex fact situations and are consequently not subject to summary judgment.

> *Kennedy v. Silas Mason Co.,* 334 U. S. 249, 68 Sup. Ct. 1031, 92 L. Ed. 1347 (1948);
>
> *Twigg v. Yale & Towne Mfg. Co.,* 7 F. R. D. 488 (D. C. N. Y., 1947).

In *Skidmore v. Swift & Co.,* 323 U. S. 134, 136, 89 L. Ed. 124, 127 (1944), involving firemen who were required to stay on their employer's premises for 24 hours a day, the Supreme Court stated:

> ". . . We have not attempted to, and we cannot, lay down a legal formula to resolve cases so varied in their facts, as are the many situations in which employment involves waiting time. Whether in a concrete case such time falls within or without the Act is a question of fact to be resolved by appropriate findings of the trial court."

In *Colby v. Klune,* 178 F. 2d 872, 873-5 (C. A. 2, 1949), a case decided subsequent to the submission of these appeals, the Second Circuit held that the defendant's undisputed affidavits showing the non-executive character of duties performed by its production manager (whose stock activities formed the basis of an insider's profits suit under the Securities Exchange Act) did not authorize entry of summary judgment for defendant, since demeanor of witnesses constituted important element in determining credi-

bility and, when ascertainment of facts turns on credibility, triable issues of fact exist.

Circuit Judge Jerome Frank, writing for a unanimous court, stated (178 F. 2d at pp. 873-5):

> "That there is here a triable issue of fact appears from the following:
>
> "(a) Assuming for the moment that Rule X-3b-2, issued by the S. E. C., is not authorized by the statute, we construe 'officer,' as used in Section 16 (b) of the Securities Exchange Act, thus: It includes, *inter alia,* a corporate employee performing important executive duties of such character that he would be likely, in discharging these duties, to obtain confidential information about the company's affairs that would aid him if he engaged in personal market transactions. It is immaterial how his functions are labelled or how defined in the by-laws, or that he does or does not act under the supervision of some other corporate representative. As we think that, at this stage of the case, it is well to reserve decision concerning the statutory power of the S. E. C. to issue Rule X-3b-2, we think that the plaintiff should be allowed at a trial to produce oral testimony in open court (by examination or cross-examination of witnesses), or other evidence, relevant under the foregoing definition of officer.
>
> "For the affidavits do not supply all the needed proof. The statements in defendants' affidavits certainly do not suffice, because their acceptance as proof depends on credibility; and—absent an unequivocal waiver of a trial on oral testimony—credibility ought not, when witnesses are available, be determined by mere paper affirmations or denials that inherently lack the important element of witness' demeanor. As we observed in Arnstein v. Porter, 2 Cir., 154 F. 2d 464,

471: 'It will not do, in such a case, to say that, since the plaintiff, in the matter presented by his affidavits, has offered nothing which discredits the honesty of the defendant, the latter's deposition must be accepted as true.' For the credibility of the persons who here made the affidavits is to be tested when they testify at a trial. Particularly where, as here, the facts are peculiarly in the knowledge of defendants or their witnesses, should the plaintiff have the opportunity to impeach them at a trial; and their demeanor may be the most effective impeachment. Indeed, it has been said that a witness' demeanor is a kind of 'real evidence'; obviously such 'real evidence' cannot be included in affidavits. In Sartor v. Arkansas Natural Gas Corp., Kansas Group, 321 U. S. 620, 628, 64 S. Ct. 724, 729, 88 L. Ed. 967, the Court said that a summary judgment may not be used to 'withdraw these witnesses from cross-examination, the best method yet devised for testing trustworthiness of testimony'; the Court, in that connection, quoted with approval from Aetna Life Insurance Co. v. Ward, 140 U. S. 76, 88, 11 S. Ct. 720, 724, 35 L. Ed. 371: 'There are many things sometimes in the conduct of a witness upon the stand, and sometimes in the mode in which his answers are drawn from him through the questioning of counsel, by which a jury are to be guided in determining the weight and credibility of his testimony.'

"Nor is the situation different because the trial will be before a trial judge without a jury. For how can the judge know, previous to trial, from reading paper testimony, what he will think of the testimony if and when, at a trial, he sees and hears the witnesses? It is because of the crucial element of demeanor-observation that a trial judge's findings are usually binding unless 'clearly erroneous'; his findings have not that effect when he has not observed the witnesses.

"'All manner of expedients,' says Dean Pound, 'have been resorted to * * * to arrive at a written settlement of the facts not dependent on the credit to be accorded witnesses or the impression they may make on the particular trial court. * * * But experience has shown that we cannot be sure that in getting a clear-cut statement of facts in this way, to which the law may be applied, we are not cutting out too much, so in the end to be trying an artificial case instead of the real controversy.'

"It may happen (although we do not know) that, because of their unavailability at the trial, plaintiff will be obliged to obtain the testimony of some or all of the defendants' witnesses by deposition. If so, the demeanor-aspect of their testimony will be lost; however, he will at least have the chance to cross-examine them, an opportunity he has not yet had. In reversing a summary judgment, the Third Circuit cogently said: 'This case illustrates the danger of founding a judgment in favor of one party upon his own version of facts within his sole knowledge as set forth in affidavits prepared *ex parte*. Cross-examination of the party and a reasonable examination of his records by the other party frequently bring forth further facts which place a very different light upon the picture.'"

In Appellants' Brief, under the subheading "Disputed Facts," we have set forth some of the triable issues of fact which exist (App. Br. pp. 13-14). Kindly refer also to Point I of the said brief, pages 15 to 21, inclusive.

We are supported in this position by the *Amicus Curiae* Brief filed herein for the Administrator of the Wage and Hour Division, U. S. Department of Labor. Point II, pages 12 to 13, inclusive.

POINT II.

The Portal-to-Portal Act, Including Section 2 Thereof, Is Not Applicable Since the Activities for Which Plaintiffs Seek Compensation Were a Regular and Normal Part of Their Employment and Did Not Involve Portal-to-Portal Activities.

In Appellants' Brief, Point III thereof, pages 26 to 30, inclusive, we took the position supported by authorities as follows:

The Portal-to-Portal Act of 1947 was not designed to overthrow the type of claim exemplified in the *Armour* case [323 U. S. 126, 89 L. Ed. 118 (1944)], or the *Skidmore* case [323 U. S. 134, 89 L. Ed. 124 (1944)]. There was no public clamor raised by the *Armour* and *Skidmore* cases; the great demand for the enactment of the Portal-to-Portal Act of 1947 came only after and was designed to overcome the decision in the famous *Mt. Clemens Pottery Case* [328 U. S. 680, 90 L. Ed. 1515 (1946)], which had followed in the wake of the *Tennessee Coal* [321 U. S. 590, 88 L. Ed. 949 (1944), and *Jewell Ridge* [325 U. S. 161, 89 L. Ed. 1534 (1945)] cases.

Please see:

"The Portal-to-Portal Act of 1947," The Bureau of National Affairs, 1-5 (1947), 3 A. L. R. 2d 1097, 1125 (1949);

Central Missouri Tel. Co. v. Conwell, 170 F. 2d 641 (C. C. A. 8, 1948), aff'g 76 F. Supp. 398 (D. C. Mo., 1948);

Mauro v. Malcolm M. Slaughter & Co. (D. C. N. Y., 1948), 14 Labor Cases, par. 74,438, p. 73,211;

Curtis v. McWilliams Dredging Co. (N. Y. City Court, 1948), 14 Labor Cases, par. 64,352, p. 72,890.

As was said in Appellants' Brief, page 28 thereof, the Portal-to-Portal Act was not meant to apply to other than portal-to-portal activities and so the above cases hold.

Since the filing of Appellants' Brief and the submission of these appeals to this Court, there have been additional authorities supporting appellants' position, including a decision of this Court.

Biggs v. Joshua Hendy Corporation, 183 F. 2d 515, 520 (C. A. 9, 1950);

Manosky v. Bethlehem-Hingham Shipyard, 177 F. 2d 529, 531, 533, 534 (C. A. 1, 1949);

Knudsen v. Lee & Simmons, 89 F. Supp. 400, 406, 407 (D. C. S. D. N. Y., 1949);

Thompson v. Stock & Sons, 9 W. H. Cases 585 (D. C. E. D. Mich., 1950);

Tobin v. Alma Mills, 9 W. H. Cases 563 (D. C. W. D. So. Car., 1950).

In the *Biggs* case, *supra,* this Court, by Circuit Judge Orr, wrote:

> "Cross-appellants further contend that work performed by appellants during lunch periods cannot be the basis for recovery under the Fair Labor Standards Act by reason of §2 of the Portal-to-Portal Act, 29 U. S. C. A., §252, because such work is not made compensable by the express provision of a contract within the meaning of §2(a)(1). That section is directed against claims for compensation for activities, such as dressing for work, traveling within the plant to the job location, etc., which are different

from the activities which comprise the regular, normal part of the employment. The section has no application where, as here, the work for which compensation is being claimed is the same kind of work as was performed throughout the remainder of the workweek."

In the *Manosky* case, *supra,* where the trial court had dismissed a complaint which did not set forth the specific activities for which plaintiff sought overtime compensation, the majority of the court by Chief Judge Magruder wrote (177 F. 2d at pp. 533-4):

"Reading the complaint in the case at bar, we find nothing to indicate that plaintiffs were seeking to recover overtime compensation for travel time to or from the place of performance of their principal activity as mechanics, or for activities, such as washing up or changing clothes, which are preliminary or postliminary to said principal activity. It strikes us that the plaintiffs have been trying all along to state a claim for statutory overtime compensation for excess hours put in by them in their principal productive activity as mechanics, which activity would certainly be compensable under the prevailing collective bargaining agreement."

In the *Knudsen* case, *supra,* Chief Judge Knox wrote (89 F. Supp. at pp. 406-7):

"*Section 2. Defenses.* Defendant further contends that the overtime claimed here was not compensable by custom, practice or express contract as required by Section 2 of the Portal-to-Portal Act.

"It is evident from the record that plaintiffs have worked 48 hours a week for numerous weeks throughout 1938 to 1945. There was no controversy in this Court over the measure of damages should liability

for overtime be found. On this record, it must be assumed that the claim here is solely for hours worked at the behest of the employer in regular employment, but not compensated at the increased rate required by the Fair Labor Standards Act for statutory overtime. Plaintiffs are not seeking payment for activities which were not thought compensable before the Anderson v. Mt. Clemens Pottery Co., 1946, 328 U. S. 680, 66 S. Ct. 1187, 90 L. Ed. 1515, decision. It is *these newly perceived claims which Section 2 sought to eliminate* and not those based, as here, on working time which always heretofore had been paid for. Michigan Window Cleaning Co. v. Martino, 6 Cir., 1949, 173 F. 2d 466." (Emphasis added.)

In the *Thompson* case, *supra,* District Judge Levin rejected the employer's contention that the Portal-to-Portal Act, Section 2 thereof, barred recovery in a case involving lunch periods in which engineers ate and were required to keep a constant watch for safe and efficient operation of machines. The court stated:

"The question then is: Does the Portal-to-Portal Act bar the plaintiffs' right to recovery? It would serve no useful purpose here to set out the well-known provisions of the Act or its legislative history which followed Anderson, *et al.,* v. Mt. Clemens Pottery Co., 328 U. S. 680 [6 WH Cases 83]. The defendant's president and bookkeeper expressed accord with the position of the plaintiffs that the defendant company was by the contract of employment required to pay for all working time and overtime compensation for all hours worked in excess of the statutory maximum. *The court having found that these employees are basing their claims for compensation for the usual activities performed during all the time they were in their respective shifts and that the so-called*

lunch period was, in fact, working time covered by the contract of employment, the claims are not barred by the Portal-to-Portal Act. The provisions of the Act were never intended to bar recovery under facts similar to those found in this case. Compare Central Missouri Telephone Co. v. Conwell, 170 F. 2d 641 [8 WH Cases 353]. See also Michigan Window Cleaning Co. v. Martino *et al.* (6 Cir.), 173 F. 2d 466 [8 WH Cases 639]; Smith *et al.* v. Cleveland Pneumatic Tool Co. (6 Cir.), 173 F. 2d 775 [8 WH Cases 750]." (Emphasis added.)

In the *Tobin* case, *supra,* District Judge Wyche likewise rejected the employer's contention that the Portal-to-Portal Act, Sections 2(a) and 4(b) thereof, barred recovery. The court stated:

"[*Relationship of Portal Act to Principal Activities.*]

"Turning now to the next question, it is the defendant's position that the stipulation quoted above bars the maintenance of the present petition for contempt under the provisions of the Portal-to-Portal Act on the ground that the pre-shift activities alleged and shown to have been performed were not compensable by contract or a custom or practice. The plaintiff, on the other hand, takes the position that the stipulation has no effect whatsoever on the maintenance of the contempt proceeding contending that the pre-shift activities are not affected by the Portal-to-Portal Act since they were not 'preliminary' or 'postliminary' activities but were 'principal' activities performed prior to the regular working hours, and it further contends that the Portal-to-Portal Act cannot and does not affect actions brought by the Administrator to enforce outstanding injunctions under the Fair Labor Standards Act.

"The defendant's contention is based on sections 2 (a) and 4 (b) of the Act, 29 U. S. C. A., secs. 252 (a) and 254 (b). Section 2 (a) provides that 'No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended * * * (in any action or proceeding commenced prior to or on or after the date of the enactment of this Act), on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any activity of an employee engaged in prior to the date of the enactment of this Act, *except on activity which was compensable by either*' an express provision of a written or non-written *contract or a custom or practice* in effect at the time of such activity. (Italics added.) Section 4 (b) reiterates the same provisions as Section 2 (a) except that it applies to future claims under the Fair Labor Standards Act, while Section 2 (a) applies to existing claims.

"[*Nature of Employee Activities.*]

"This raises the question whether or not the pre-shift activities performed in the instant case were activities compensable by contract or a custom or practice. It has been stipulated that 'there was no contract written or otherwise, or custom or practice in effect which provided for the compensation of these employees for the pre-shift time.'

"*Congress when it passed the Portal-to-Portal Act expressed its displeasure with the interpretation given the Fair Labor Standards Act of 1938 by the Supreme Court in the following cases: Tennessee Coal Co. v. Muscoda Local,* 321 U. S. 590, 88 L. Ed. 949, 64 S. Ct. 698 [8 Labor Cases, par. 51.175]; *Jewell Ridge Co. v. Local 6167,* 325 U. S. 161, 89 L. Ed.

1534, 65 S. Ct. 1063 [9 Labor Cases, par. 51,201]; and *Anderson v. Mt. Clemens Pottery Co.,* 328 U. S. 680, 90 L. Ed. 1515, 66 S. Ct. 1187 [11 Labor Cases, par. 51,233]. This displeasure is shown in the Report of the House Judiciary Committee when H. R. 2157 (the Portal-to-Portal Act) was reported out of the committee. It is there stated (U. S. Code Cong. Serv., 80th Cong., 1st Sess., p. 1030):

" 'The Fair Labor Standards Act does not define "work" or "workweek" and does not prescribe what preliminary or incidental activities shall be compensable under the provisions of the law. That was left to be settled by the employer and employee, either by express agreement or by implied agreement, based on the custom or practice in that particular place of employment. That had been the general situation for many years prior to the passage of the Act.

" 'In *Anderson v. Mt. Clemens Pottery Co.* the Supreme Court had before it important issues "concerning the proper determination of working time for purposes of the Fair Labor Standards Act and involved was the question whether time spent in walking on the employer's premises to the work station and time spent in certain preliminary and incidental activities must be included in the compensable work week."

" 'The Court said:

" 'It follows that the time spent in walking to work on the employer's premises, after the time clocks were punched, involved "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business" (*Tennessee Coal Co. v. Muscoda Local,* 321 U. S. 590, 598 [8 Labor Cases, par. 51,175]; *Jewell*

Ridge Co. v. Local No. 6167, 325 U. S. 161, 164-166 [9 Labor Cases, par. 51,201]). Work of that character must be included in the statutory workweek and compensated accordingly, regardless of contrary custom or contract.'

"The Congress rightly called this a far-reaching result; in fact it found that result so far-reaching that it passed the Portal-to-Portal Act to put an end to claims which would have wrecked the entire economy of the nation had they been allowed to proceed to a conclusion under the law of the Mt. Clemens Pottery Co. case.

"The defendant contends that the Portal-to-Portal Act goes so far as to strike down claims for overtime work where an employee performs part of his 'principal' activities prior to the commencement of his regular shift on which the activities are to be performed. I cannot agree with this contention.

"I am in accord with that portion of the interpretation given the Portal-to-Portal Act by the Administrator concerning the question of what is considered to be the 'principal' activity or activities of an employee within the terms of Section 4 of the Act. The Administrator's interpretation of the Act is found in Title 29, Code of Federal Regulations, 1947 Supp., commencing at page 4401. Section 790.8 of the Regulations, p. 4413, provides in part as follows:

" '(a) An employer's liabilities and obligations under the Fair Labor Standards Act with respect to the "principal" activities his employees are employed to perform are not changed in any way by section 4 of

the Portal Act, and time devoted to such activities must be taken into account in computing hours worked to the same extent as it would if the Portal Act had not been enacted. But before it can be determined whether an activity is "preliminary or postliminary to (the) principal activity or activities" which the employee is employed to perform, it is generally necessary to determine what are such "principal" activities.

" 'The use by Congress of the plural form "activities" in the statute makes it clear that in order for an activity to be a "principal" activity, it need not be predominant in some way over all other activities engaged in by the employee in performing his job; rather, an employee may, for purposes of the Portal-to-Portal Act, be engaged in several "principal" activities during the workday. The "principal" activities referred to in the statute are activities which the employee is "employed to perform"; they do not include noncompensable "walking, riding, or traveling" of the type referred to in section 4 of the act. * * * The legislative history further indicates that Congress intended the words "principal activities" to be construed liberally in the light of the foregoing principles to include any work of consequence performed for an employer, no matter when the work is performed. A majority member of the committee which introduced this language into the bill explained to the Senate that it was considered "sufficiently broad to embrace within its terms such activities as are indispensable to the performance of the productive work." '

"A similar interpretation is given the provisions of section 4 of the Act in the message of the President when he returned the signed Act to Congress. In this message he states that 'the legislative history of the Act shows that the Congress intends that the words "principal activities" are to be construed liberally to include any work of consequence performed for the employer, no matter when the work is performed.'

"In the instant case the activities on which the contempt is based were activities which were a part of the work to be performed by the employee: during the regular shift on which they were employed. The activities do not fall within the purview of the Act excluding certain 'preliminary' and 'postliminary' activities. Instead they are part of the 'principal' activities to be performed by the employees and for which they were employed. Cf. Central Missouri Tel. Co. v. Conwell (CCA 8), 170 F. (2d) 641 [15 Labor Cases, par. 64,839]." (Emphasis added.)

Judge Wyche has summed up appellants' position here. Furthermore, it is supported by the government in its *Amicus Curiae* Brief for the Administrator of the Wage and Hour Division, U. S. Department of Labor, Point I, pages 5 to 12, inclusive.

POINT III.

Plaintiffs' Services and Activities Were Compensable Under an Express Contract and/or Custom and/or Practice.

In Appellants' Brief and Appellants' Reply Brief on file herein, we took the position supported by authorities as follows:

The plaintiffs herein rendered their services under the terms of and in accordance with an express written agreement [Substation Division Order No. A-36] to receive overtime compensation at the rate of one and one-half times the normal rate of pay. We have reprinted in a footnote, *supra*, the pertinent provisions of the "contract" which has been held sufficient in law to constitute an express contract, custom and practice to entitle plaintiffs to overtime compensation.

Please see:

Joshua Hendy Corp. v. Mills, 169 F. 2d 898, 900 (C. C. A. 9, 1948):

Frank v. Wilson & Co., 172 F. 2d 712, 715 (C. C. A. 7, 1949);

Devine v. Joshua Hendy Corp., 77 F. Supp. 893, 905 (D. C. Cal., 1948);

Llewellyn v. Hardy-Burlingham Min. Co., 73 F. Supp. 63, 66 (D. C. Ky., 1947).

In the *Joshua Hendy* case. *supra,* this Court had before it a substantially similar contract, reading in part as follows (169 F. 2d at 900):

"4. Hours of Employment and overtime.

"Forty (40) hours shall constitute a work week, eight (8) hours per day, five (5) days per week, Monday to Friday, inclusive, between the hours of

> 8 a. m. and 5 p. m., except that where, as to any locality or as to any plant of any employer, existing traffic conditions render it desirable to start the day shift at an earlier hour, such starting time may, with agreement of the employer affected and the local Metal Trades Council, be made earlier, but in no event earlier than seven (7) a. m. Overtime at the rate of one and one-half times the established hourly rate shall be paid for all work performed in excess of eight (8) hours per day and forty (40) hours per week. * * *."

In the last mentioned case, the plaintiffs claimed overtime for one-half hour per day which was worked in addition to the 8 hour shift. The defendant contended that it was relieved from liability under the Portal-to-Portal Act by reason of the times when the employees worked only seven and one-half hours. This Court rejected the defendant's contention and held that there was an express contract making the activity compensable within the meaning of the Portal-to-Portal Act. It stated (169 F. 2d at 900):

> "It is paragraph 4 of the contract which renders the Portal-to-Portal Act inoperative. That paragraph, it will be noted, establishes the work week at 40 hours straight time and 8 hours overtime and further provides for the payment of overtime for all 'work performed' in excess of 40 hours per week. Mills performed 11 hours work in excess of 40 hours within the meaning of the phrase 'work performed.' He was paid for 8 hours overtime only."

Paragraph 5B (4) of Order No. A-36, herein, specifically states that 40 hours of work shall constitute the work week. It is further specifically provided in paragraph 8C that overtime shall be paid at the rate of one

and one-half times the hourly rate. The instant case therefore falls directly within the facts and the holding of this Court in the *Mills* case, *supra*. It follows that an agreement to pay for overtime services is an agreement to pay for all overtime services irrespective of when those services are performed.

It should be noted that the reference in the Biggs case [183 F. 2d at p. 520] *to a possible error in the Mills case, supra, favors the appellants here.*

In *Frank v. Wilson & Co., supra,* the employment contract in effect provided [172 F. 2d at p. 715]:

> "Employees who are required to work over 8 hours in any one day * * * will be paid one and one-half times their regular rate for all such overtime hours."

Referring to this Court's *Mills* case, *supra,* the Circuit Court for the Seventh Circuit stated [172 F. 2d at p. 715]:

> "In Joshua Hendy Corp. v. Mills, 169 F. 2d 898, 900, the Court of Appeals for the Ninth Circuit reviewed a somewhat similar situation. At that plant the normal daily work shift was eight and one-half hours, less a half-hour lunch period. It was Engineer Mills' duty to give almost constant attention to the boiler, which customarily prevented his taking time off for the lunch period. Nevertheless he was paid for only eight hours work per day. The labor contract in force provided that overtime compensation would be paid for all 'work performed' over forty hours per week. The court held:
>
> "'* * * It is paragraph 4 of the contract which renders the Portal-to-Portal Act inoperative. That paragraph, it will be noted, establishes the work week

at 40 hours straight time and 8 hours overtime and further provides for the payment of overtime for all "work performed" in excess of 40 hours per week. Mills performed 11 hours work in excess of 40 hours within the meaning of the phrase "work performed." He was paid for 8 hours overtime only.'

"We are bound by the finding of the district court that the plaintiffs were required to work five minutes in excess of the eight regular hours on each of the days indicated by the time cards in evidence (as compiled in the stipulation). We conclude that the activities of the plaintiffs were covered by an express provision of a written contract, and that the Portal-to-Portal Act of 1947 is not a bar to maintaining this action."

Said another way *the rule is that where overtime duties are an integral part of the employment of the employee, those activities are compensable by contract.*

Marchant v. Sands, Taylor & Wood Co., 75 F. Supp. 783, 787 (U. S. D. C. Mass., 1948);

Green v. LeVan (U. S. D. C. Tenn., 1948), 15 Labor Cases, par. 64,777, p. 74,479.

Even without a specific agreement to pay for overtime entered into between the employer and the employees, there is in all employment relationships a contract to pay overtime for work in excess of 40 hours per week by reason of the fact of the incorporation into every contractual relationship of the provisions of the Fair Labor Standards Act.

Conwell v. Central Missouri Tel. Co., 74 F. Supp. 542 (D. C. Mo., 1947), 76 F. Supp. 398 (D. C. Mo., 1948), aff'd 170 F. 2d 641 (C. C. A. 8, 1948).

It should be noted furthermore that the plaintiffs here rendered and the defendant accepted their services under a general custom and practice that all of the plaintiffs' services and activities were to be paid for by a weekly or monthly salary. Defendant contended below that certain of the work of the plaintiffs were "inactive" and therefore not compensable. It also contended below that so-called "active" duties of plaintiffs could be performed in 2 to 5 hours per day; and that evaluating the employment as a whole, the services of the plaintiffs, that is, both the "active" and "inactive" duties, were the equivalent of 8 hours per day. The defendant, by its own admission, was paying the plaintiffs a fixed wage, not only for what the defendant chose to designate "active" duties, but for so-called "inactive" duties. A custom and practice was therefore established by the plaintiffs to pay for all work irrespective of the nature or description of the constituent elements constituting and making up the totality of the efforts expended by the plaintiffs.

Under the circumstances, therefore, it is clear that plaintiffs' services were compensable *in some amount* either under express contract or under custom and practice.

Biggs v. Joshua Hendy Corporation, 183 F. 2d 515, 517 (C. A. 9, 1950);

Frank v. Wilson & Co., 172 F. 2d 712, 715 (C. A. 7, 1949);

Joshua Hendy Corp. v. Mills, 169 F. 2d 898, 900 (C. A. 9, 1948);

Central Missouri Tel. Co. v. Conwell, 170 F. 2d 641 (C. C. A. 8, 1948), aff'g 76 F. Supp. 398 (D. C. Mo., 1948);

Mauro v. Malcolm M. Slaughter & Co. (U. S. D. C. N. Y., 1948), 14 Labor Cases, par. 64,299, p. 72,715.

POINT IV.

Defendant Was Not Relieved of Its Obligations by Reason of Section 9 and Section 11 of the Portal-to-Portal Act.

The attention of this Court is respectfully drawn to Appellants' Brief, Points VI and VII thereof, pages 39 to 49, inclusive.

In this brief we have already called the Court's attention to *Colby v. Klune,* 178 F. 2d 872, 873-5 (C. A. 2, 1949), holding that summary judgment is not authorized since the demeanor of witnesses constitutes an important element in determining credibility——or good faith for that matter.

Sections 9 and 11 of the Portal-to-Portal Act involve among other things elements of good faith which obviously require a trial on the merits.

Appellee's contentions with respect to this point were rejected in part by Chief Judge Knox in *Knudsen v. Lee & Simmons,* 89 F. Supp. 400, 405-6 (D. C. S. D. N. Y., 1949) as follows:

> "*Section 9.* One necessary element of a valid defense under this section of the Portal-to-Portal Act is that the employer's action in reliance upon an administrative ruling or policy conform to such ruling or policy. General Statement as to the effect of the Portal-to-Portal Act of 1947 on the Fair Labor Standards Act of 1938, 29 CFR, 1947 Supp., 790.14. To satisfy this condition, defendant must show that the administrative opinion exempted these plaintiffs from the Act.
>
> "In my judgment, the Administrator was always of the opinion that work such as was performed by these plaintiffs did not justify exemption from the

Act. The Administrator's opinion was principally expressed in Bulletin 11. I find both versions of this Bulletin to so read, and the Court of Appeals for this Circuit, in considering the revised version, agreed in this interpretation.

"Defendant relies on the Administrator's action in reference to the Smoot Company and the Gale decision. I do not find it inconsistent with my view. The Smoot ruling, of July, 1940, was specifically said not to be of general application. Further, in October, 1940, the Administrator reaffirmed his view that the Smoot ruling was confined to the employees of that company and stated that, 'there should be compliance with the provisions of Interpretative Bulletin No. 11 except where individual establishments have obtained individual notice from the Administrator that their employees shall be considered seamen, and are therefore exempt from the Act.' Finally, in June, 1941, the Administrator reversed the Smoot ruling. This history certainly indicates that the Administrator believed that these employees would not be exempt, rather than the contrary. As to the Gale decision, the Administrator interpreted it as to require that 'employees' duties must be concerned with the navigation of the vessel,' an opinion certainly not helpful to defendant's cause.

"Defendant also contends that its failure to comply with the Act was attributable to *good faith* RELIANCE upon an administrative practice or policy of non-enforcement. It is a fact that the Administrator took no steps to enforce the Act against the lighterage industry. In addition, a field investigator of the Administrator visited defendant's offices in April, 1940, and examined the defendant's books, and also, to some extent, made inquiry into the nature of its business. Following such investigation no demand was made on

defendant to confer on its lighter captains the advantages of the Fair Labor Standards Act.

"This contention falls for the reason that here we do not have a failure to enforce and nothing more, but instead, a failure to enforce coupled with a stated administrative policy, which called for enforcement. The purpose of Section 9 is to relieve employers who have in good faith relied on what the administrative opinion was, even where that opinion was only revealed by a so-called nonenforcement policy. *But where a policy is stated, the mere failure to enforce is not what the law contemplates as constituting such a nonenforcement policy as will relieve from liability.*

"Moreover, the failure of the field investigator of the Wage and Hour Division to find a violation after inquiry into defendant's payroll practices can not be considered an administrative ruling within Section 9. It does not constitute an opinion of the Administrator and has been so held in prior cases. Burke v. Mesta Machine Co., D. C. W. D. Pa., 1948, 79 F. Supp. 588; Semeria v. Gatto, Sup. 1947, 75 N. Y. S. 2d 140; Wells v. Radio Corp. of America, D. C. S. D. N. Y., 1948, 77 F. Supp. 964.

"In saying this, I do not mean to state that defendant was acting in *conscious* disregard of the Administrator's stated policy. Indeed, the record convinces me that such was not the fact. The classification of defendant's employees depended on the proportion of time occupied between cargo and navigational duties. The administrative record reveals a standard outlined only in the most general terms, and it was not difficult for defendant to deceive himself into believing that the services of his employees fell within the exempt category. However, the decisions of this Court and the Court of Appeals for this Circuit determined

that the nature of the services rendered by defendant's employees placed them within the nonexempt class as outlined by the Administrator. *Defendant having failed to conform to the administrative opinion, although his error was committed in good faith, can not defeat the plaintiff's claim for the advantages of the 1938 Act.*

"*Section 11.* On the above view of the case, I am of the opinion that defendant is entitled to relief under Section 11 of the Portal-to-Portal Act even though the defense under Section 9 fails. Ferrer v. Waterman S. S. Corp., D. C., Puerto Rico, 1949, 84 F. Supp. 680; Conwell v. Central Missouri Telephone Co., D. C. W. D. Mo., 1948, 76 F. Supp. 398, affirmed 8 Cir., 1948, 170 F. 2d 641; Sawyer v. Bay State Motor Co., D. Mass., 1948, 89 F. Supp. 843. Section 11 provides that 'if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act, * * * the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 16(b) of such Act.'

"*The record indicates that defendant had reasonable grounds for believing that his employees were exempt.* The lack of specificity in the administrative record, coupled with the variable nature of plaintiffs' employment, made defendant's error a reasonable one. Furthermore, the failure of the Wage and Hour investigator to find a violation would tend to secure defendant in its erroneous belief. Anderson v. Arvey Corp., D. C. E. D. Mich., 1949, 84 F. Supp. 55; Bauler v. Pressed Steel Car Co., D. C. N. D. Ill., 1948, 81 F. Supp. 172. *I find, therefore, that defend-*

ant acted in good faith and accordingly, I shall relieve him of the obligation to pay liquidated damages to the plaintiffs." (Emphasis added.)

Notwithstanding that Chief Judge Knox exonerated the defendant under Section 11 only, we will be happy to have Judge Knox's principle apply to this case if we could obtain for the appellants a trial on the merits concerning its good faith.

Conclusion.

This is not an action where plaintiffs seek compensation for portal-to-portal activities such as washing, dressing and walking to work. Most of the plaintiffs worked, slept and lived on defendant's property. Most of the plaintiffs worked on shifts of 24 hours per day.

There was no difference in the working habits of the plaintiffs before or after the enactment of the Fair Labor Standards Act. They still worked 24 hours a day, less sleeping time possibly. *The only change was in the bookkeeping of the defendant.*

Defendant contends that it divided the duties of plaintiffs into "active" and "inactive" and that it may in its own discretion compress both types of duties and evaluate them at but 8 hours per day. The law is that plaintiffs are entitled to straight time for 40 hours, time and one-half for all hours worked, "active" or "inactive," over 40 hours. In the words of the Administrator of the Act, *plaintiffs were engaged to wait and were not waiting to be engaged.* This case, therefore, does not involve stand-by or waiting time. Even if it did, plaintiffs would be entitled to overtime compensation in accordance with the *Armour* and *Skidmore* cases, which cases were not overruled or overturned by the Portal-to-Portal Act of 1947.

The instant appeal gives rise to important and complicated issues of law and fact and should be tried by a court and jury; although it would be most helpful if the Court, in reversing the judgment below, would indicate the correct principles of law to be applied.

Respectfully submitted,

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